American Showa, Inc. *and* Teamsters Local Union No. 413 a/w International Brotherhood of Teamsters, AFL–CIO. Case 8–CA–31106

May 22, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On March 17, 2000, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.[1] The Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

AMENDED CONCLUSION OF LAW

Substitute the following for Conclusion of Law 3.

"3. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by coercively interrogating an employee and informing him that he was discharged because of his union activities."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, American Showa, Inc., Sundbury, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Coercively interrogating employees concerning their union activity and coercively informing employees that they will be discharged because of their union activity."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively question you about your union support or activities, or inform you that you could be terminated for engaging in union support or activities.

WE WILL NOT discharge, suspend, or otherwise discriminate against any of you for supporting Teamsters Local Union No. 413, a/w International Brotherhood of Teamsters, AFL–CIO or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the date of the Board's Order, offer Christopher Hankins full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Christopher Hankins whole for any loss of earningS and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Christopher Hankins, and we will, within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

AMERICAN SHOWA, INC.

Thomas M. Randazzo, Esq., for the General Counsel.
Jonathan R. Vaughn, Esq. and *Richard T. Miller, Esq., o*f Columbus, Ohio, for the Respondent-Employer.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on January 27 and 28, 2000, in Delaware, Ohio, pursuant to a complaint and notice of hearing (the complaint) issued by the Acting Regional Director for Region 8 for the National Labor Relations Board (the Board) on December 7, 1999.[1] The complaint, based upon a charge filed by Teamsters Local Union No. 413, a/w International Brotherhood

[1] No exceptions were filed to the judge's recommended dismissal of the allegation that the Respondent unlawfully created the impression that employees' union and protected activities were under surveillance.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's conclusions of law, recommended Order, and notice to employees to conform to the violations found by the judge.

[1] All dates are in 1999 unless otherwise indicated.

of Teamsters, AFL–CIO (the Charging Party or the Union) alleges that American Showa, Inc. (the Respondent or ASI) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that the Respondent suspended and discharged employee Christopher Hankins, and engaged in two independent violations of Section 8(a)(1) of the Act by unlawfully and coercively interrogating an employee regarding his union and protected activities and by letter, creating the impression that employees' union and protected activities were under surveillance.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the manufacture of automotive parts in Sundbury, Ohio, where it annually sells and ships goods valued in excess of $50,000 directly to points located outside the State of Ohio. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

In May 1999, Christopher Hankins talked to a union official about commencing an organizing campaign at Respondent. He became the leading union adherent in the machine department and was an active and open supporter of the Union. In this regard, Hankins talked to a number of employees about the Union, handed out authorization cards, and engaged in a number of conversations with supervisors about the need for a union at the Respondent.

Respondent and Honda of America Manufacturing (Honda) formed a partnership and the majority of the automotive parts manufactured by the Respondent are supplied to Honda. At all material times Takeshi Kawaguchi is the president of Respondent, Donald Westover serves as plant manager and vice president, and Michele Kerschner holds the position of associate relations manager. The Respondent has adopted many of the personnel and work policies of Honda and all employees wear uniforms similar to those of Honda employees.

Hankins commenced employment with Respondent in February 1994, and was continuously employed until being suspended on July 16, and subsequently discharged on July 19. During his tenure of employment, Hankins received numerous awards for perfect attendance (GC Exh. 37) and countless awards under the ASI Voluntary Involvement Program for Quality, Suggestive and Safety Recognition (GC Exhs. 39, 40, and 41). All Respondent employees including Hankins are eligible to participate in Quality Circle and the Voluntary Involvement Programs. The Respondent has established a milestone-awards program (GC Exh. 5), that enables employees to earn awards upon achieving certain point levels.[2] Hankins was the first employee to attain all of the milestone point levels and in addition to being the recipient of a monetary award at the silver level, he earned a 2-week all expense paid vacation to Hawaii. In December 1998, Hankins was the first and only employee at the facility to be awarded a Honda Civic LX after achieving the 5000-point milestone.[3] That recognition was memorialized with an article and picture of Hankins and the car in the ASI News and Views (GC Exh. 6). In addition, Hankins and another employee won a trip to Japan based on their winning a competition at Respondent for contributions to a Quality Circle project (GC Exh. 38). That trip was taken with President Kawaguchi and Plant Manager Westover. On a number of occasions, both Kawaguchi and Westover would stop by Hankin's work location and compliment him on his industry and contributions to the Respondent.

B. The Facts

On July 12, Hankins returned to work from a planned family vacation in Canada, and brought back a case of beer for a friend who had previously worked on his car. Hankins placed the beer in a cooler in the employee cafeteria. Later that day, Hankins walked into the cafeteria to see if his friend had removed the gift from the cooler. He was informed by one of the maintenance employees that a management representative had locked the beer in the cooler. Hankins proceeded to the office to talk with Kerschner.[4] Hankins apprised Kerschner that the beer was a gift for a coworker. Kerschner informed Hankins that beer should not be brought to the facility but permitted Hankins to retrieve the beer from the cooler and take it home. No type of formal warning or discipline was visited upon Hankins for this incident.

On July 13, Hankins had lunch in the cafeteria with fellow employees Julie Liming and Val Reese. He made a comment to them that Smith probably found the gift in the cooler. Reese apprised Hankins that Smith was not responsible for the beer being locked in the cooler.

On July 14, Hankins along with a number of other employees proceeded to the cafeteria around 11 a.m., for their regularly scheduled lunch. As he entered the cafeteria and turned right toward the cooler to retrieve his lunch, Hankins accidentally nudged Smith who was bent over and as she was raising up, bumped her on the right shoulder. He said, "excuse me," and continued toward the cooler. While he was eating lunch with employees Liming and Reese, Smith stopped by the table and said to Hankins, "that you really hurt my shoulder when you bumped into me and you had a mile to walk around me." Smith then walked away from the table and Hankins commented to Leming and Reese that Smith seems to be upset. Reese told Hankins that Smith was just joking. After lunch, Hankins proceeded directly to the conference room for a pro-

[2] The silver award is achieved once an employee earns 1000 points. An employee is awarded $800. The gold award is reached after earning 2500 points and an employee is presented with a special vacation. Once an employee reaches 5000 points and achieves ASI status, they are entitled to receive a Honda Civic LX. GC Exh. 42 is a compilation of Hankin's total points from January 1, 1997, to May 1999.

[3] The automobile has an assessed value of $16,000.

[4] Mildred Smith, an employee of contract provider Aramark, apprised Hankins that she had nothing to do with the beer being locked in the cooler. Smith is in charge of all the vending machines at Respondent and has worked in this capacity for approximately 10 years.

duction meeting, but decided that if he hurt Smith's feelings or her shoulder, he would apologize.

After the production meeting ended around 12 noon, Hankins returned to the cafeteria and touched Smith's shoulder to get her attention. He said, "If I hurt your shoulder in any way, I apologize." Smith said, "no your not, you did that on purpose and are trying to be a smart ass." Smith became angry and informed Hankins that she heard all the negative things that he had said while blaming her for the confiscation of the beer. Hankins attempted to disabuse Smith of her assertions, but Smith was intent on ending the conversation. Hankins persisted and "remained in her face" as she continued to back away from the discussion. Indeed, Smith attempted to end the conversation on three separate occasions, but Hankins persisted despite Smith repeatedly informing him that the conversation had ended. As a number of employees started to move in the direction of the conversation, and Hankins determined that Smith was not listening to him, he left the cafeteria and returned to work.

Shortly after returning to the machine department, Hankins was summoned to the conference room. Kerschner asked Hankins what happened with Smith in the cafeteria, as she wanted to hear his side of the story. Hankins volunteered that he accidentally bumped into Smith but apologized at the time. He then approached Smith in the cafeteria after the production meeting ended to offer another apology and ask about her shoulder. Smith started yelling and Hankins recommended that she should go to administration if there was a problem. After Hankins informed Kerschner what had taken place, he was instructed to return to work.

On July 15, Westover was in the machine shop and Hankins complained to him about the majority of the machine department equipment being relocated to Respondent's other plant that would necessitate relocating a number of employees including Hankins to the second and third shift. Westover said, "Don't lie to me, is that why you want to see a union come in?" "Is that why you and Pam are pushing for a Union?" Hankins replied, "Well Don, I will say this much, some of the policies need to be looked at." Westover said, "You think a Union will change anything around here." Hankins responded, "I don't want to discuss the Union."[5]

On July 16, Kerschner asked two employees and Smith to provide written statements concerning the incident that took place in the cafeteria between Hankins and Smith on July 14.[6] No investigation was commenced before this time as Kerschner was in all day meetings on July 14 and 15. Around 10:30 a.m., Hankins dropped by Kerschner's office on his way home as he had previously scheduled a half-day of vacation. He apprised Kerschner of his game plan involving a transfer to another machine line due to the impending removal of the equipment from the machine department and sought her feedback regarding the plan. While Kerschner gave positive feedback to Hankins about the transfer, she did not apprise him that she was in the process of obtaining witness statements involving the July 14 incident nor did she solicit a written statement from Hankins. After returning home, Hankins received a voice mail message to call Kerschner at the facility. Hankins telephoned Kerschner and was informed that he was going to be suspended for 3 days for creating a hostile work environment based on the July 14 incident with Smith. Hankins was quite upset during the conversation and could not believe that he was being suspended for offering an apology to Smith. He also voiced concern that Kerschner did not seek a written statement from him after she mentioned that several statements were received from Respondent employees. Hankins further said, "Don't you want to investigate the entire matter and confirm that I apologized to Smith or that she called me a smart-ass?"[7]

On July 17, Hankins left a voice mail message on Westover's telephone that Kerschner wanted to give him 3 days off for creating a hostile work environment.

On July 18, Hankins was able to reach Westover at home and told him what happened concerning the suspension. Westover did not want to discuss the matter over the telephone but instructed Hankins to come into the facility on Monday afternoon, so they could discuss the matter. In anticipation of the meeting, Hankins prepared a written statement (GC Exh. 45).

On July 19, Hankins went to the facility and upon arriving saw Kerschner, who inquired why he was at the plant since he was supposed to be on suspension. Hankins informed Kerschner that he had talked to Westover over the weekend and a meeting was arranged for today. Kerschner picked up Hankins' personnel file and then met Hankins and Westover in the conference room. Hankins proceeded to read his prepared statement but was interrupted by Westover. He apprised Hankins that he was a liar and informed him that the Respondent had a statement in its possession from a coworker that he had been harassing Smith for approximately a year. Westover said, "We

[5] Westover did not specifically deny that the July 15 conversation took place. Rather, he testified that weeks before July 15 while walking through the plant, a couple of employees informed him that the people in the machine department were upset because their equipment was being moved and that Hankins was passing out union cards. That afternoon, Westover saw Hankins in the plant and said, "I just wanted to let you know about something, people are saying you're passing out union cards." Hankins denied it.

[6] Adecco, a temporary employment service at Respondent, On-Site Service Manager Bobbi Haak-Hikens submitted a typed statement on the morning of July 16, while Respondent employee Tracie Nelson submitted a statement via e-mail at 10:40 a.m. on July 16 (R. Exhs. 7 and 11).

[7] Kerschner memorialized a memorandum to the file that states in pertinent part:

> To: Associate File of Christopher Hankins
> From: Michelle Kerschner, Associate Relations Manager
> Date: July 16, 1999
>
> Subject: Creating a Hostile & Intimidating Work Environment
>
> On Wednesday, July 14, 1999, upon walking into the cafeteria for lunch at about 12 noon, Bobbi Haak-Hikens (Adecco Onsite Representative) approached me about an incident between Midge Smith (ARAMARK Vending Hostess) and Chris Hankins (Machining Associate).
>
> I spoke to Chris Hankins on the afternoon of 7/14/99. Chris explained that earlier in the day he bumped into Midge on his way into the cafeteria for his lunch. He apologized briefly at that time. Then, after the associate meeting at 12:00, he again approached Midge to offer another apology. He asked her how her shoulder felt & Midge started yelling at him. Chris told Midge several times she should go to Administration if there was a problem.
>
> After discussing the above facts with Donald Westover (Plant Manager, Vice President), we are both in agreement that Chris should receive a 3-day suspension which will be served 7/19/99, 7/20/99, 7/21/99. I also informed Chris that any other intimidating contact with Midge may result in further action, up to and including termination (G.C. Exh. 7).

know you have been lying to us." Kerschner handed Hankins employment application to Westover who informed Hankins that he did not list Honda as a prior employer on his job application. Hankins admitted this fact and informed Westover that he did not read the fine print on the application and did not know that you had to list every previous employer on your job application. Westover informed Hankins that he knew that Hankins had previously worked at Honda for the last several months. Westover asked what else did Hankins lie about on his job application to Respondent? Hankins volunteered that he resigned from Honda when he was given the option of going before a peer review board or quitting his employment. Westover said, "I am going to terminate your for a number of reasons."

1. Not listing Honda on your application.
2. For being the ringleader in organizing the Teamsters Union in the machine department.
3. Threatening Midge Smith.

Hankins replied, "that he was not a union organizer and did not work for the Teamsters."

Westover told Hankins that he should not have gotten involved with the Union. Hankins refused to sign the termination slip and said, "this is what its all about, my involvement in the Union."

Hankins was too upset to sign the final exit papers and was escorted off the premises by his supervisor.

C. The 8(a)(1) *Allegations*

The General Counsel alleges in paragraph 6(a) of the complaint that Westover, on or about July 15, coercively interrogated an employee regarding his union and protected activities.

On July 15, Westover was in the machine shop and Hankins complained to him about the majority of the machine shop equipment being relocated to Respondents other plant and that this would necessitate relocating a number of employees including Hankins to the second and third shift. According to Hankins, Westover said, " Don't lie to me, is that why you want to see a union come in?" "Is that why you and Pam are pushing for a Union?" Hankins replied, "Well Don, I will say this much, some of the policies need to be looked at." Westover said, "You think a Union will change anything around here." Hankins responded, "I don't want to discuss the Union."

Westover admitted that he was aware of union activity at the plant and candidly acknowledged that the policy of the Respondent is to operate its business without the presence of the Union.[8] Westover testified that the only conversation he had with Hankins about the Union occurred sometime in late June or early July 1999. In this regard, some employees informed Westover that Hankins was passing out union authorization cards. Westover approached Hankins in the plant at that time and said, "I heard you are handing out union cards." Hankins denied it.

The general test applied to determine whether employer statements violate Section 8(a)(1) of the Act is "whether the employer engaged in conduct which reasonably tends to interfere with, restrain, or coerce employees in the free exercise of rights under the Act." *NLRB v. Aimet, Inc.,* 987 F.2d 445 (7th Cir. 1993); *Reeves Bros.,* 320 NLRB 1082 (1996).

If Westover made the above statements to Hankins on July 15, then the Act was violated. I am inclined to credit Hankins for the following reasons. Hankins impressed me as a sincere and candid witness whose testimony has a ring of truth to it. Westover, on the other hand, was a very cavalier witness whose testimony was evasive and inconsistent and his memory faulty in many areas. Additionally, while Westover admitted that he had a conversation with Hankins wherein the Union was discussed in late June or early July 1999, he never specifically denied that he discussed the Union in a conversation with Hankins on July 15. Moreover, Westover's credibility is further cast in doubt when Kerschner contradicted his testimony on what occurred on July 19. In this regard, Westover testified that it was only after Kerschner left the conference room on July 19, and after he officially terminated Hankins, that the topic of the Union came up. To the contrary, Kerschner testified that Westover mentioned Hankins' involvement in the Union organizing campaign while all three individuals were in the conference room.[9] For all of the above reasons, I find that Westover unlawfully and coercively interrogated Hankins on July 15, as alleged in paragraph 6(a) of the complaint. Therefore, I recommend that Respondent be found to have violated Section 8(a)(1) of the Act.

The General Counsel alleges in paragraph 7 of the complaint that about July 22, President Kawaguchi, by letter, unlawfully and coercively informed employees that it was aware an employee or employees have been involved in the Union's organizing drive at its facility, thereby creating the impression that employees' union and protected activities were under surveillance.[10]

I am not inclined to find a violation of Section 8(a)(1) of the Act based on the content of the Respondent's July 22 letter, for the following reasons. First, Hankins testified that in May and June 1999, he openly discussed the Union with a number of supervisors and confirmed to these individuals that he openly supported the Union. Second, the Union distributed campaign literature to employees and Respondent supervisors prior to July 22 (R. Exhs. 15, 16, and 17). Indeed, President Kawaguchi was sent campaign literature at his home address prior to July 22. Third, the first paragraph of the letter and the reference to "with inside help" does not refer to Hankins or any other specific employee. Compare *Royal Manor Convalescent Hospital,* 322 NLRB 354 (1996).

[8] Indeed, the Respondent's handbook specifically apprises employees that it is not necessary nor do we believe it will ever be necessary for you or anyone else to belong to a union in order to have a voice in the management of your own working affairs (GC Exh. 2, p. 6).

[9] In sworn testimony on October 21, before the State of Ohio Unemployment Compensation Review Commission, Kerschner testified that during the July 19 meeting, Westover stated that he had heard rumors in the plant that Hankins was behind some union activity (GC Exh. 10, p. 42). Under these circumstances, I fully credit Hankins testimony that on July 19, Westover informed him that one of the reasons he was being terminated was because he was the "ring leader" of organizing the Teamsters Union in the machine department. Thus, in agreement with the allegations in par. 6(b) of the complaint, I find that Respondent unlawfully and coercively informed Hankins that he was discharged because of his Union and protected activities, in violation of Section 8(a)(1) of the Act.

[10] The July 22 letter states in pertinent part:

> It has come to our attention that the Teamsters union, with inside help, has been conducting an ongoing organizing campaign at our plant. We want to make it perfectly clear what our position is on this. We strongly believe that a union is not in your best interests or in the best interests of the company (G.C. Exh. 14).

For all of these reasons, I recommend that paragraph 7 of the complaint be dismissed.

D. The 8(a)(1) *and* (3) *Allegations*

1. The suspension

The General Counsel alleges in paragraph 8(a) of the complaint that on July 16, the Respondent suspended employee Hankins.

Respondent acknowledges that it suspended Hankins on July 16, but for reasons unrelated to his union activities.

Kerschner is responsible for documenting employee discipline by either preparing a memorandum for the file or with an independent associate counseling record form that she and the impacted employee sign. The Respondent has four independent levels of counseling depending on the severity of the infraction. If an employee is charged with creating a hostile or intimidating work environment, it is appropriate to first counsel the employee at level three. If an employee is charged with fighting with or attempting bodily injury to another associate while on Respondent property, the appropriate level of counseling is level four or other discipline depending on the severity of the infraction.

In *Wright Line,* 251 NLRB 1083 (1990), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1992), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1993). In *Manno Electric,* 313 NLRB 278 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it world have taken the same action even if the employee had not engaged in protected activity.

For the following reasons, I find that the General Counsel has made a strong showing that the Respondent was motivated by antiunion considerations in suspending Hankins. First, the evidence establishes that Westover was aware that Hankins was actively involved in the Union's organizing campaign and that he passed out union authorization cards to Respondent employees. Second, I specifically found that on July 15, 1 day before the suspension, Westover unlawfully and coercively interrogated Hankins regarding his union and protected activities.

The burden shifts to the Respondent to establish that the same action would have taken place even in the absence of the employee's protected conduct.

I find that the reasons advanced by Respondent for the suspension are pretextual and suggest a predetermined plan to create a reason to rid the facility of one of the leading union activists. I base this finding on the following reasons.

The investigation conducted by Kerschner regarding the incident that took place between Hankins and Smith on July 14 was shallow and incomplete. First, although Kerschner spoke to Hankins about the incident on July 14, she did not ask that he submit a written statement as she did with Smith and the two other employee witnesses. Second, after reviewing the statements from the three witnesses, Kerschner did not talk to Hankins to get his side of the story or provide him the opportunity to submit a written statement. Likewise, it is significant that if Smith was critically injured when Hankins bumped into her shoulder, she did not report the incident to the police or security. Additionally, Smith did not seek medical attention, did not leave work on July 14 nor was she absent from work on any successive days and did not file a workman's compensation claim. More critical, in my opinion, is Kerschner's failure to interview two witnesses that Smith mentioned in her July 16 written statement. Indeed, employee Julie Liming credibly testified that she ate lunch with Hankins and Val Reese on July 14. Liming and Reese were both present when Smith walked up to the table and informed Hankins that her shoulder still hurt. Liming testified that she heard Hankins apologize to Smith and characterized it as a "sincere apology." Additionally, Liming testified that Hankins stopped by her work location after lunch and asked her whether he should apologize again to Smith. Liming informed Hankins that it wouldn't hurt. Liming also confirmed that Hankins saw her after 12 noon and said, "Man, I went to apologize to her, and she was irate."

Also troubling to me, is Kerschner's testimony that she decided to suspend Hankins on July 16, because he attempted to injure Smith. Contrary to this articulated reason, Kerschner prepared a July 16 memorandum to the file that states Hankins was suspended for creating a hostile and intimidating work environment (GC Exh. 7).[11] Later on August 5, in a transmittal sheet to the Ohio Bureau of Employment Services, Kerschner states that "Christopher was suspended for violation of our Associate Conduct policy" which states that associates should not fight with or attempt bodily injury to another Associate while on ASI property (GC Exh. 11). The shifting, inconsistent, and contradictory reasons articulated for the suspension leads me to conclude that they were advanced to camouflage the true reason for the action.

In addition to the above reasons, I find that the Respondent engaged in disparate treatment when it suspended Hankins in comparison to other employees who did not participate in protected activities. In this regard, employee Joe Mudd first received a verbal warning in January 1993, after his supervisors previously counseled him about creating an intimidating and hostile work environment (GC Exh. 21). A second conference occurred with Mudd on June 14, 1995, attended by Westover, wherein additional problems concerning working relationships were discussed (GC Exh. 22). On August 22, 1996, a meeting took place with Kerschner to discuss Mudd's creating a hostile and intimidating work environment (GC Exh. 24). On October 28, 1996, Westover notes the fact that Mudd was referred to "IMPACT," an employee assistance program (GC Exh. 23). In an Associate Counseling Record dated May 22, 1997, at level four, it was noted by Kerschner that due to the number of incidents involving Mudd that any future incident would result in his removal from his work department (GC Exh. 25). On June 26, 1998, an Associate Counseling Record notes that Mudd used abusive language to a fellow associate (GC Exh. 26). In an October 14, 1998, Associate Counseling Record, Kerschner notes that Mudd has experienced additional incidents on October 2, 9, and 13, 1998, involving the creating of a hostile work environment (G. C. Exh. 27). Finally, on October 16, 1998, Kerschner

[11] I note and credit Hankins' testimony that on July 16 in his telephone call with Kerschner, she informed him that he was being suspended for creating a hostile work environment.

notes on Mudd's Associate Counseling Record that due to another incident involving creating a hostile work environment, his employment will be terminated (GC Exh. 28).

In comparison to the numerous incidents involving Mudd and Respondent's tolerance for his transgressions, Hankins was suspended for engaging in one infraction of creating a hostile work environment. I also note that sometime in 1998, the Associate Counseling Record was revised to now require that employees must be referred to IMPACT at level three and above. While Mudd was referred to IMPACT, Hankins was not provided that opportunity.

In regard to employee Jeff Banks, an Associate Counseling Record dated April 8, 1993, shows that he was counseled for creating a hostile work environment (GC Exh. 16). On June 8, 1993, Westover notes in an Associate Counseling Record that Banks had engaged in another incident of creating a hostile work environment (GC Exh. 15). On November 24, 1997, due to another incident involving a hostile work environment, Westover states in Bank's Associate Counseling Record that he was being suspended until evaluated by a medical doctor (G. C. Exh. 19). Banks was permitted to return to work on December 7, 1993, after he completed the medical examination. In sharp contrast, Hankins was not provided the same accommodations as Banks. Subsequently in April 1996, due to an additional incident of harassment, Banks was given the option of a referral to IMPACT or the option to resign (GC Exh. 17). Finally on May 28, 1996, Banks was terminated for engaging in additional incidents of creating a hostile work environment and refusing to fully comply with the Respondent's referral to IMPACT. In comparison to Banks, Hankins was not given the same opportunities to seek counseling and reduce his hostility. Rather, he was suspended for his first infraction.

Lastly, Associate Counseling Records involving employee Hiro Isoda show that he was given two opportunities of counseling by Westover, before being suspended for three days on his third infraction for using abusive language and creating a hostile work environment (GC Exhs. 29 and 30).

For all of the above reasons, I find that Hankins was suspended because of his protected activities on behalf of the Union, rather then the shifting and inconsistent reasons advanced by Respondent. Likewise, I conclude that Respondent would not have suspended Hankins on July 16, but for his union and protected activities. Accordingly, I recommend that Respondent be found to have violated Section 8(a)(1) and (3) of the Act when it suspended Hankins on July 16.

2. The termination

The General Counsel alleges in paragraph 8(b) of the complaint that on July 19, Respondent discharged Hankins.

Respondent opines that Hankins was terminated on July 19, for failure to disclose on his job application that he worked at Honda from January 1988 to June 1990. Additionally, Respondent asserts that Hankins did not reveal on his application or resume that he was previously convicted of a felony or was forced to resign his employment from Honda.

On July 19, Hankins went to the facility and upon arriving saw Kerschner, who inquired why he was at the plant since he was supposed to be on suspension. Hankins informed Kerschner that he had talked to Westover over the weekend and a meeting was arranged for today. Kerschner picked up Hankins personnel file and then met Hankins and Westover in the conference room. Hankins proceeded to read his prepared statement but was interrupted by Westover. He asked Hankins whether he had been truthful in his job application. Hankins stated that he had. Westover said that he was a liar and informed him that the Respondent had a statement in its possession from a coworker that he had been harassing Smith for approximately a year. Westover said, "We know you have been lying to us." Kerschner handed Hankins' employment application to Westover who informed Hankins that he did not list Honda as a prior employer on his job application. Hankins admitted this fact and informed Westover that he did not read the fine print on the application and did not know that you had to list every previous employer on your job application. Westover informed Hankins that he knew that Hankins had previously worked at Honda for the last several months. Westover asked what else did Hankins lie about on his job application to Respondent? Hankins volunteered that he resigned from Honda when he was given the option of going before a peer review board or quitting his employment. Westover said, "I am going to terminate your for a number of reasons."

1. Not listing Honda on your application.
2. For being the ringleader in organizing the Teamsters Union in the machine department.
3. Threatening Midge Smith.

Hankins replied, "that he was not a Union organizer and did not work for the Teamsters."

Westover told Hankins that he should not have gotten involved with the Union. Hankins refused to sign the termination slip and said, "this is what its all about, my involvement in the Union."

Hankins was too upset to sign the final exit papers and was escorted off the premises by his supervisor.

Under the *Wright Line* analysis described above, the burden shifts to the Respondent to establish that the same action would have been taken place even in the absence of the employee's protected conduct.

Westover testified and adopted his telephone statement given on August 5, to the Ohio Bureau of Employment Services, that indicates Hankins was terminated on July 19 while still on disciplinary suspension (GC Exh. 9). In this regard, Westover claims in his telephone statement, that Hankins was terminated because he admitted on July 19 that he did not list Honda on the ASI job application, that he was previously convicted of a felony and was forced to resign his employment from Honda. These two additional reasons are in sharp contrast to the Associate Counseling Termination Record dated July 19, and signed by Westover and Kerschner. That document shows only that Hankins did not disclose on his job application that he had worked for Honda from January 1988 to June 6, 1990 (GC Exh. 8). Likewise, Westover testified that he told Hankins on July 19, that he was being terminated for falsifying the ASI application. He specifically stated, based on my questions, that he did not tell Hankins that he was being terminated for previously having been convicted of a felony or because of the bumping incident with Smith. Additionally, on August 13, in a Request for Reconsideration to the Ohio Bureau of Employment Services, Respondent again asserts that Hankins was discharged for failure to disclose he worked at Honda from January 1988 to June 1990 (GC Exh. 12). Again, as found above, Respondent presents shifting and inconsistent reasons for Hankins' termination.

Even more significant, in my opinion, is Westover's admission in his testimony and the August 5 statement, that he and

Kerschner were aware for at least 3 months before July 19, that Hankins had falsified his job application. This places that knowledge in a period of time prior to Westover learning about Hankins' union activity in late June or early July 1999. Significantly, Respondent took no action to discipline Hankins at that time. It was only after Hankins' union activity came to light and the July 15 interrogation, that any discipline was visited upon Hankins. It is noted that Respondent's job application warns employees in at least two places that it must be truthful on the application. Indeed, a warning is included at the beginning and the end of the job application that provides that if an individual is not truthful on the application, they could be discharged (R. Exh. 5). Lastly, Kerschner admitted that no other employee prior to July 19 has ever been terminated at Respondent for falsifying a job application.[12]

In examining the totality of the discipline visited upon Hankins within a 3-day period, I note that it was directed against an employee that possesses an exemplary performance record. Indeed, Hankins achieved a perfect attendance record and had accumulated numerous awards including becoming the first employee to earn 5000 points. For this accomplishment, he first earned a monetary award, then was the recipient of a 2-week all-expense paid vacation to Hawaii and in December 1998, was presented a Honda automobile, the first and only employee at Respondent to achieve such a honor. In addition, Hankins won a competition that enabled him to take a trip to Japan with Westover and Kawaguchi. As discussed above, I found that the suspension visited on Hankins was pretextual and was solely received because of his union activities. In this regard, the investigation was not thorough and in comparing the lenient treatment afforded other similarly situated employees accused of creating a hostile work environment, the differences are glaring. Likewise, I find that Respondent's termination of Hankins on July 19 was solely related to his union activities. Respondent attempted to boot strap the suspension and the falsification of the job application to mask its true reason for the termination. I fully credit Hankins' testimony that on July 19, Westover stated that one of the reasons that he was being terminated was for getting involved in the union organizing campaign. The other reasons, as discussed above, were pretextual to camouflage the true reason for the termination.

Accordingly, for all of the above reasons, I find that the Respondent would not have terminated Hankins but for his union activities. Therefore, I recommend that Respondent be found to have violated Section 8(a)(1) and (3) of the Act when it terminated Hankins on July 19.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by coercively interrogating and threatening an employee concerning his union activity.

4. By suspending and thereafter terminating Christopher Hankins, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily suspended and discharged Christopher Hankins, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, American Showa, Inc., Sundbury, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating and threatening employees concerning their union activity.

(b) Discharging, suspending, or otherwise discriminating against any employee for supporting Teamsters Local Union No. 413, a/w International Brotherhood of Teamsters, AFL–CIO.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Christopher Hankins full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Christopher Hankins whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge, and within 3 days thereafter notify Christopher Hankins in writing that this has been done and that the suspension and the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Sundbury, Ohio, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the

[12] Assuming Hankins did in fact falsify his employment application, the evidence concerning employee Scott Sindelar who apparently falsified his employment application but was not discharged, is further evidence of disparate treatment (GC Exhs. 34, 35, and 36).

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the

Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 15, 1999.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED hat the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."